# ARKANSAS SUPREME COURT

No. CR 06-1044

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| MICHAEL LOWRY<br>Appellant<br><br>v.<br><br>STATE OF ARKANSAS<br>Appellee | **Opinion Delivered** **April 5, 2007**<br><br>APPEAL FROM THE CIRCUIT COURT OF SALINE COUNTY, CR 2002-766, HON. GRISHAM A. PHILLIPS, JR., JUDGE<br><br>AFFIRMED. |

**PER CURIAM**

A jury found appellant Michael Lowry guilty of first degree stalking, arson and violation of a protective order, and sentenced him to an aggregate term of 360 months' imprisonment. This court affirmed the judgment upon a petition for review from the Arkansas Court of Appeals. *Lowry v. State*, 364 Ark. 6, ___ S.W.3d ___ (2005). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied without a hearing. Now before us is appellant's appeal of that order.

Appellant raises three points on appeal, as follows: (1) that the order denying postconviction relief was insufficient because it failed to find that the record of the case conclusively showed that appellant's claim of ineffective assistance of counsel for failure to seek suppression of certain evidence was without merit; (2) that the trial court erred in failing to find ineffective assistance of counsel for failure to seek suppression of the same evidence; (3) that the trial court erred in failing to find ineffective assistance of counsel for failure to request an instruction as to the common law

presumption against arson. The order entered denying postconviction relief indicated that the trial court found that appellant's claim as to the motion to suppress was without merit because a motion to suppress the evidence would have been unsuccessful, and that appellant had failed to show that an instruction on the common law presumption against arson would have been given if counsel had requested it.

Appellant's argument on his first point is based upon language that he cites from a letter from the trial court to counsel included in the addendum, which does not appear within the record. This court does not consider matters outside of the record. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002). We have repeatedly stated that it is the appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error, and where the appellant fails to meet its burden, this court has no choice but to affirm the trial court. *Davidson v. State*, 363 Ark. 86, 210 S.W.3d 887 (2005).

In any case, the order that was entered into the record is sufficient under Ark. R. Crim. P. 37.3(a), regardless of appellant's claim as to any previous ruling. We have held that it is not necessary for the trial court to use the term "conclusively," provided that the findings are clearly to that effect. *Rutledge v. State*, 361 Ark. 229, 205 S.W.3d 773 (2005) (per curiam). Here, the order stated that the petitioner would have to show that the motion could have been successful for the allegation to have merit and that the trial court found "that the motion, had it been filed, would have been unsuccessful." The written order clearly was to the effect that the record of the case did conclusively show that the petitioner was not entitled to relief on the issue.

As to appellant's assertions of error by the trial court's failure to find ineffective assistance of counsel, we also find no reversible error. In an appeal from a trial court's denial of a petition

under Rule 37.1, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The *Strickland* standard is a two-part test. To prevail on a claim of ineffective assistance of counsel under this standard, a defendant must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, the defendant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000).

In our review, this court indulges in a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Burton v. State*, 367 Ark. 109, ___ S.W.3d ___ (2006). The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.* The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id*.

Appellant argues that the trial court erred in finding the motion to suppress would not have been successful, asserting that the search violated Ark. R. Crim. P. 11.1 and this court's holding in

*State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), by the officers failing to advise appellant that he could refuse consent to the search. However, the trial court found that the search was shown by the record to have been incident to appellant's arrest. We cannot say that finding was clearly erroneous.

The facts in the case are set out in more detail in our opinion on appellant's direct appeal, but the testimony was that two police officers observed appellant's truck a short distance from the site of the fire within minutes of the time the fire started. Although one officer recognized the truck, he did not initially recall the owner's name. When the officers arrived at the scene of the fire, the stalking victim told them appellant had started the fire. The police officer then recalled whose truck they had just seen, and some time later the officers left and, along with additional investigating officers, went to appellant's home. The officers could see appellant's truck in the carport as they went to the door of his trailer to knock, and the officers confirmed that it was the vehicle they had seen near the fire.

As the trial court noted, the record indicates that the officers went to appellant's home for the purpose of arresting him. Appellant was arrested. The only evidence at issue in this appeal is the officer's observation of a pair of shoes as they watched appellant dress to leave with them. As the trial court concluded, the officer's would have been justified in accompanying appellant into his bedroom to dress in order to protect themselves and prevent escape. *See* Ark. R. Crim. P. 12.1. Items in plain view pursuant to officers arresting a suspect on probable cause may be seized. *See Edwards v. State*, 360 Ark. 413, 201 S.W.3d 909 (2005). The officers could testify to observing the shoes.

Moreover, appellant made no showing of prejudice. Even had the shoes been excluded, the

evidence against appellant was very strong. The police officer recognized appellant's truck, even though he did not immediately recall to whom it belonged. The vehicle was a short distance from the fire shortly after the blaze started. There was someone obviously trying not to be seen on the other side of that truck. Appellant admitted that he had arrived home not long before the officers arrived to arrest him. Hours before the fire started, appellant had made a comment that "[t]hey're going to burn for this shit." He had also made other less contemporaneous comments to the stalking victim that he had threatened to "light your house." Appellant did not demonstrate that the exclusion of the shoe evidence could have changed the outcome of the trial.

Appellant's last argument contends the trial court erred by failing to find ineffective assistance of counsel for failure to request an instruction as to the common-law presumption against arson. He bases this argument, as to both error by trial counsel and prejudice, on the premise that the jury could not have found sufficient evidence to overcome the common-law presumption against arson if given the instruction. Yet our previous opinion on appellant's direct appeal is dispositive of that issue. There we held that there was sufficient evidence to overcome that presumption. *Lowry*, 364 Ark. at 18, ___ S.W.3d at ___. The law-of-the-case doctrine dictates that a decision made in a prior appeal may not be revisited in a subsequent appeal. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000). A decision in a prior case becomes law of the case, even if wrongly decided, and matters decided in the first appeal are considered concluded. *Id*. at 250, 33 S.W.3d at 489. The trial court was bound by our previous decision on those issues. Because the trial court did not err in finding trial counsel was not ineffective, we affirm the denial of postconviction relief.

Affirmed.